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IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Petitioners,

v.

MARGARITA LOPEZ TORRES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE CATO INSTITUTE, REASON FOUNDATION, AND THE CENTER FOR COMPETITIVE POLITICS, IN SUPPORT OF NONE OF THE PARTIES

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government and to secure those rights both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends the Institute and the Center undertake a wide variety of publications and programs. The instant case is of central interest to Cato and the Center because it addresses the core First Amendment freedom of political associations to control their internal decision-making without interference by the State.

Reason Foundation is a nonpartisan and nonprofit 501(c)(3) organization, founded in 1978. Reason's mission is to promote liberty by developing, applying, and communicating libertarian principles and policies, including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason Magazine, as well as commentary on its website, reason.com, and by issuing policy research reports, which are available at reason.org. Reason also communicates through books and articles in newspapers and journals, and appearances at conferences and on radio and television. Reason's personnel consult with public officials on the national, state, and local level on public policy issues. Reason selectively participates as *amicus curiae* in cases raising significant constitutional issues. This case involves a serious threat to freedom of political association and contra-

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

venes Reason's avowed purpose to advance "Free Minds and Free Markets."

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. Over the last decade, well over $100 million has been spent to produce ideological studies promoting campaign finance regulation. Those studies have gone largely unchallenged, and dominated the policy debate. CCP is concerned that a politicized research agenda has hampered both the public and judicial understanding of the actual effects of campaign finance laws on political competition, equality, and corruption. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the corresponding results of a more free and competitive electoral process.

STATEMENT

This case presents the unusual and troubling spectacle of two opposing factions within the major political parties each turning to the government as the means of forcing their views of how best to resolve intra-party competition upon their internal opponents. While the opposing forces each may have ample grounds for preferring either primary elections or nominating conventions as the method of deciding who the party should support for elected judicial office, resolving such intra-party factional disputes seems to be a quintessentially internal matter properly left to the parties themselves.

In this case, the two sides seem to accept that the process by which a political party nominates a candidate to stand for election has both public and private attributes but emphasize different sides of that dichotomy in an attempt to justify state

imposition of either conventions or primaries as a means of candidate selection by the parties.

The Second Circuit below, for example, started out by paying lip service to the notion, as described by this Court, that the political parties' means of selecting its nominees for office are not "'wholly public affairs that States may regulate freely.'" *Torres* v. *New York State Bd. of Elections*, 462 F.3d 161, 185 (CA2 2006) (quoting *California Democratic Party* v. *Jones*, 530 U.S. 567, 572-73 (2000)). But it then quickly turned to a number of this Court's cases finding that party primaries, because they serve as gateways to the general election ballot, involve state action for purposes of applying various constitutional provisions to constrain the conduct of such primaries. *Torres*, 462 F.3d at 185-86 (citing, *inter alia*, *United States* v. *Classic*, 313 U.S. 299 (1941) and *Terry* v. *Adams*, 345 U.S. 461 (1953). By emphasizing that party nominating procedures were integral parts of the public election process as a whole, the court below then found a right of voter participation and candidate access to such nomination procedures, found that New York's convention system for nominating candidates burdened that right, and justified its imposition of a party primary election as at least an interim measure for providing such participation and candidate access. *Torres*, 462 F.3d at 186-89, 191-93, 201, 206.

Petitioners, by contrast, seemingly accept some state control over the decision-making process by which political parties select their nominees, thus implicitly accepting the existence of a state-action component to party nominating procedures. Pet. at 14-15 (citing *American Party of Texas* v. *White*, 415 U.S. 767, 781 (1974) for the proposition that a State may limit parties to one candidate per office on the general election ballot and require parties to use conventions or primaries to settle intra-party competition). But petitioners likewise shift emphasis in the opposite direction by characterizing the nominating process as involving "internal conflicts within the party," focusing on the "associational rights of political par-

ties to determine how to best select their standard bearers" and a "political party's right to publicly endorse and support a candidate of its choosing," and ultimately relying on the First Amendment rights of political parties themselves, as supposedly distinguished from the First Amendment rights of the rank-and-file members of such parties. Pet. 12, 13, 24-28. They then oddly use that different emphasis to defend a state law that *compels* the major political parties to use a nominating convention to select their judicial candidates and, less oddly, to oppose an injunctive remedy compelling the parties to use a primary to select their nominees.

While *amici* here agree with petitioners that it is the private and free-association aspects of party nominating decisions that should be the central focus of this case, they disagree with the attempted distinction petitioners seek to draw between the rights of the party as an association and the rights of party members as part of that association. And *amici* further disagree with some of the implications petitioners seek to draw from the parties' First Amendment rights of free association. The First Amendment indeed protects the political parties in the methods they choose for resolving internal disputes and deciding what candidates to endorse and support as their standard bearers. But that protection certainly does not support a statute that *compels* the parties to use nominating conventions any more than it allows an injunction that compels the use of a party primary. Rather, the relevant, and entirely consistent, associational rights of both the parties and their members, suggest that the methods by which parties choose candidates to endorse and support should be left to the parties themselves and resolved by the free play of private politics within the parties, rather than by the stifling hands of the State or the courts. Such government intervention to side with one or the other intra-party faction short-circuits what would otherwise be an ongoing internal debate over candidate selection methods. While parties indeed have the right to structure their internal affairs, they must also bear the respon-

sibility for their structural decisions and party members thus have the correlative right to seek to influence those decisions without the State standing in the way or exerting its power in support of either side of an internal dispute.

SUMMARY OF ARGUMENT

1. Properly understood, the nomination by a political party of a candidate – one of the standard-bearers of the party – is a private act of expression and association that lies at the heart of the First Amendment and that must be left to the parties themselves as to the method and means for making such a selection. Numerous cases from this Court have recognized the fundamental and protected nature of a party's decision-making process with regard to its support for candidates for elected office. The decision of who represents the party, and who to support in a bid for election, lies at the heart of free association and operates independent of the process for actually getting that prospective candidate on the ballot. Even where a State chooses to free-ride on party selection processes in determining a candidate's qualification to be placed on an election ballot, the underlying process remains fundamentally private and protected, and it is only the State's separate decision regarding what significance or effect to give such party decisions that constitutes genuine state, rather than private, action. From that perspective, state laws compelling parties to use particular means of deciding who to support in an election represent a severe infringement on the First Amendment rights of the parties and their members.

2. The authority and interests of a State in regulating elections generally, and ballot access in particular, do not extend to controlling the internal affairs of private political parties. While it is true that the conduct of an election and the state decisions regarding who to place on the ballot are public activities in which the State has a variety of compelling interests, those public activities and interests cannot be pursued at the expense of destroying the constitutionally protected free-

dom of association that makes elections meaningful democratic exercises in the first place. Whatever the State's justification for compelling political parties into the role of ballot gatekeepers, the decision to use partisan ballots remains only a choice, not a necessity, and if that choice is then used to justify coercive regulation of the parties' freedom of association, it may cease to be a permissible choice. If the States are to free-ride on the decisions of private associations, they should take such associations as they find them or, alternatively, stop relying on such associations and adopt a set of neutral rules for ballot access that operate independently from such private associational activity. There are ample alternative means of serving any legitimate state interests in regulating elections and ballot access, and any further justifications for forcing elections through the partisan lenses of parties are either non-compelling or are in fact antithetical to the freedom of association protected by the First Amendment.

3. The proper application of First Amendment principles in this case leads to the conclusion that this Court should affirm in part on other grounds, vacate in part, and remand for further proceedings as to remedy. The freedom of association protected by the First Amendment precludes the State from interfering with the internal affairs and choices of political parties by mandating that they select their standard-bearers in a particular fashion. The law *requiring* judicial nominees to be selected by nominating convention thus is indeed unconstitutional, though not for the reasons given by the court of appeals. The right being denied is not that of the rank-and-file members of the party to have a say in nominations in a particular manner or with particular effect, but rather the right of all members of the association, and of the association itself, to resolve internal disputes about candidate selection methods as the party and its members see fit.

As to the remedy, however, this Court should vacate the injunction and remand for further proceedings to determine whether New York law, absent the convention requirement, in

fact requires parties to use primaries to select judicial candidates. If New York law does not so require, the choice of candidate selection method should be left to the parties themselves. If, however, New York law does require primaries as the default mandate, the parties then should have the opportunity to challenge such a requirement on the same grounds described herein for striking down the convention requirement. The State likewise would then have an opportunity to offer any arguments it could marshal as to whether and why the two requirements might be treated differently notwithstanding the First Amendment principles discussed herein.

ARGUMENT

The decision below and the position of petitioners both conflate the protected private roles of political parties and the legitimate public function of government in regulating elections. While each side in this case seeks to emphasize a different aspect of the conflated rights and interests, they both reach the same erroneous view that it is up to the State to enforce and require a preferred means for a party to select its standard bearer in the form of a candidate for judicial office. The dispute between petitioners and respondents over whether conventions or primaries are the best method of resolving intra-party competition is ultimately a private dispute to be resolved within each party itself, without the State weighing in and enforcing the views of either internal faction in such disputes.

I. Political Parties Are First and Foremost Private Expressive Associations with a First Amendment Right Freely to Select, by Their Own Chosen Means, which Candidates to Support for Election.

In *amici*'s view, political parties are fundamentally private expressive associations protected by the First Amendment *both* as to their decisions of who to support for elected office *and* as to the means by which they reach such decisions.

Numerous decisions from this Court have recognized the fundamentally private character of parties as political associations and the First Amendment's protection of internal party decision-making processes. *See, e.g.*, *California Democratic Party* v. *Jones*, 530 U.S. at 573 (Constitution protects parties' "internal processes"); *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (First Amendment protects processes by which party selects a "standard bearer"); *Democratic Party of United States* v. *Wisconsin ex rel. La Follete*, 450 U.S. 107, 122 (1981) (freedom of party to define and limit those who constitute the association). In the end, whether a private political expressive association chooses to reach its decisions by emulating democratic elections and polling its membership or instead adopts a more hierarchical decision-making process, is of concern only to the association and its members, not the government. Indeed, the government has no legitimate business taking sides in such internal disputes, and doing so infringes upon the freedom of association by short-circuiting the internal party politics that will either lead to a compromise best suited to the particular party and its members or that may prove the dispute to be intractable and hence lead to new associations.

Applied to this case, these basic First Amendment principles of free association protect political parties not only in their decisions of *who* to support for office, but also in their chosen methods for making those decisions within the parties. Under those principles, the First Amendment rights of the party leadership and the party rank-and-file are not in tension at all, but are in fact two sides of the same coin. In choosing to associate with a party, members take the existing association as it is, and if they find aspects of the association not to their liking, they are free to work within the party to change things, whether it is the leadership structure, the method of choosing candidates to support, or elements of the party platform. Failing that, they are free to accept the good along with the bad or to seek out different associations with which their

views are more compatible. That is the full extent of the associational rights of individual party members or party factions given that any protected association with a party must be *free* association, meaning freely chosen not merely by the potentially dissenting individuals, but by the remainder of the association as well. For the party itself to deny individual party members a particular degree of say in party affairs does not deny them any *rights* whatsoever, but merely denies them their *preference* on a disputed matter of internal policy. While the Constitution protects the right of such individuals to seek associations more to their liking, it hardly compels other similarly free members of the party to accommodate such dissenting desires.

The central assumption of the court below, that the rights of the party rank-and-file are somehow in conflict with the rights of the party leadership or the party as an entity, thus misconceives the nature of associational rights under the First Amendment. The only rights at issue are the rights to structure an association's affairs free from government interference or compulsion and the right of individuals to associate with or dissociate from the group. But any supposed First Amendment right of the rank and file of a political association to a more "democratic" role in the affairs of an association simply does not exist. The only genuine "right" association members have is to vote with their feet, with all other rights vis-à-vis the association as a whole being simply a matter of intra-party negotiation and compromise to make the party more or less appealing to those it seeks to attract. The rights the court below was seeking to protect when it struck down the law requiring nominating conventions thus were illusory, and the court should instead have relied on the associational rights of the parties and their members simply to be free from government control over their internal decision-making processes. Those rights are both faithful to the First Amendment and are more than sufficient to strike down the law mandating the use of nominating conventions.

At base, a political party is nothing more than a private association of individuals who choose to collectively take positions on political issues generally, and on candidates for office in particular. Nobody is forced to join a political party, and nobody is prevented from leaving a political party. In that context of free entry and egress from a private association, the internal affairs of that association are and ought to be wholly private matters left to resolution among the members themselves in whatever manner they choose. Many such private associations may choose a majoritarian approach to resolving internal disputes over what prospective candidates the group as a body should support. Others might chose a more centralized method of leaving such decisions to party leaders.

Ultimately, however, the various members of a private association effectively endorse or reject the approach taken by their decision to remain associated with or to disassociate from the political association in question. In that way, political association is indeed free in the purest and most absolute sense that nobody is forced to associate with any particular party, and all may enter into and leave political associations at will depending on how well or poorly such associations comport with their conscience and with their perceived self-interest, taking into account both the plusses and minuses of any potential association. What neither faction in an internal dispute may do, however, is use the resources and authority of the State to tilt the scales of an internal dispute, to enforce a particular solution to that dispute, or, worst of all, to shift the blame, and hence the political responsibility, for the resolution of such dispute to the State, thus short-circuiting the intra-party political process through the supervening power of the State.

II. The Progressive Incorporation of Political Parties into the State's Election Machinery Provides No Constitutionally Sufficient Justification for Dictating Internal Party Procedures.

The main difficulty with the parties-as-private-associations approach described above is the unavoidable fact that many States, including New York, have effectively incorporated the major political parties into their election processes by making them the primary gatekeepers of ballot access in partisan elections. In such a gatekeeping role, party selection of candidates to be placed on the general election ballot does seem to involve state action so as to make party nominee selection processes less-than-wholly-private affairs. Indeed, such intertwining of party and government processes is precisely what has driven this Court to apply various constitutional limitations to the conduct of partisan primaries. *See California Democratic Party* v. *Jones*, 530 U.S. at 573 (discussing *Smith* v. *Allwright*, 321 U.S. 649 (1944) and *Terry* v. *Adams*, 345 U.S. 461 (1953)); *Torres*, 463 F.3d at 185-86 (discussing *Classic* and *Terry*).

In light of such entanglement between the private functions of the parties and the public functions of the government in regulating elections and ballot access, States would indeed seem to have significant interests in regulating related party conduct as well. But appearances can be misleading in this context insofar as the States generally *compel* parties to play such a gatekeeping role and hence asserting a state interest in regulating such gatekeeping functions begs the question whether forcing private associations into governmental roles is compatible with the First Amendment, particularly where the role likewise forces them to sacrifice essential aspects of their freedom of association.

From a private-association perspective on political parties, of course, the decision to nominate a candidate for office is in fact little more than a decision formally to endorse a prospec-

tive candidate. It has no power or significance beyond its expressive and persuasive significance, and does not in and of itself have any legal consequence. An endorsement, without more, does not get a candidate on a ballot, though it certainly indicates that the candidate is likely to be able to fulfill any neutral criteria for ballot access. Where the private association perspective gets difficult is in connection with the wholly distinct state decision to use party endorsement as a proxy for its own responsibility for regulating ballot access. Giving legal effect to a mere party endorsement by converting such an endorsement into the controlling factor for ballot access in effect delegates the State's power of controlling ballot access to private associations, which then in turn is used to justify greater state regulation of those private associations until the distinction between public and private actors is so blurred that the First Amendment begins to lose meaning.

While a State may certainly have *valid* interests in seeking to free-ride on the activity of private associations in making the State's own ballot access decisions and to narrow the field to serious contenders, those interests do not justify imposing the further burden on free association of then interfering with the internal processes of such associations. Rather, to the extent that political parties are deemed inadequate to meet the State's interests in winnowing the field in an appropriate manner, the State is free to adopt alternative methods of regulating ballot access that do not rely on party processes, but it is not free to strip parties of their private character and remake them in the State's preferred image.

Amici recognize, and both parties cite, this Court's decision in *American Party of Texas* v. *White*, which states that "[i]t is too plain for argument * * * that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention." 415 U.S. 781. With respect, *amici* believe that such proposition is by no means "too plain" for argument and

that it ultimately begs the question why parties, rather than candidates, are the proper units of ballot access, or why two prospective candidates with more than enough support to be serious contenders can be excluded from appearing simultaneously on an election ballot merely because they are members of the same political party.[2]

But, even assuming that a State can legitimately force candidates to run a party gauntlet (or abandon party affiliations entirely and run as an independent) in order to gain access to the general election ballot, the proposition that a party can be limited to a single slot on the ballot for each office merely justifies requiring parties to *make* a choice, not controlling the *manner* in which such a choice is made. If the State feels that party decision-making is too restrictive of candidate access, it is certainly free to make access to the general ballot easier and less party-dependant. That is by far a less restrictive alternative to any legitimate state interests. But having forced the parties into a gatekeeper role, any dissatisfaction with how they perform that role is a self-inflicted wound that does not justify restricting party First Amendment rights in lieu of having the State directly set party-neutral ballot-access rules for the general election. [3]

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[2] Such skepticism is particularly apt where a single party is effectively the "only game in town," as is apparently the case in various parts of New York, and hence the only serious competition in an election would come from members of the same party rather than from a different party.

[3] One, though not the only, solution, would be to have non-partisan ballots. Political parties would, of course, remain free to endorse whichever candidates they desired, and to assist such favored candidates in getting a place on the ballot by, for example, collecting the necessary signatures to petition onto the ballot, but their decision of who to endorse would return to the wholly private function that it should be, separate and apart from the government's requirements regarding ballot access. And insofar as a State continued to prefer a two-step process for winnowing the field, non-partisan open primaries with an eventual run-off are ready solutions.

Any further purported interests in preventing party splitting or minimizing factionalism not only involve harms that are at best speculative, but in fact are interests directly counter to the very core of free association. Using state power to hinder or discourage individuals from freely leaving existing associations and forming new ones – *i.e.*, party splitting – on its face runs counter to the freedom of association by coercing individuals to remain in existing associations and to forgo associations with others (or with a subset of their current associates) who may have a greater congruence of views. Similarly, attempting to fight factionalism by tilting the scales in favor of existing factions more likely to achieve majority status simply misconceives the whole problem of faction. Madison's greatest concern regarding the "violence of faction" was not the proliferation of many small factions, but the "superior force of an interested majority." Federalist No. 10, THE FEDERALIST PAPERS 45 (Rossiter & Kesler eds. 1999). The solution to the danger of faction was not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction "unable to concert and carry into effect schemes of oppression." *Id.* at 49. Far from being compelling, a desire to decrease or hobble the formation of smaller factions is anathema to the "republican remedy for the disease[]" of factionalism. *Id.* at 52. The proper remedy for a concern with factions is not to bind them into majorities, but rather to encourage their diversity and freedom, thereby allowing them to check each other with their conflicting efforts. The alternative of trying to suppress the phenomenon of numerous factions "by destroying the liberty which is essential to its existence," is a remedy "worse than the disease." *Id.* at 45-46.

Ultimately, the correct perspective is to recognize that a State's preference to delegate some of its election-related functions to private associations cannot be a valid justification for state intrusion into such private associations thereby converting them into arms of the State. Co-opting and control-

ling the field of effective political associations is no less an offense to the First Amendment than suppressing such associations directly.

III. This Case Provides a Reasonable First Step in Resolving the Confusion between the Private Associational Role of Political Parties and the Public Election-Related Regulatory Role of States.

While much of the above discussion is critical of this Court's past cases dealing with state action in the context of partisan primaries, this case does not require the Court to revisit such matters at this time. Rather, it provides a limited opportunity to take a narrow step in reemphasizing the primarily private associational character of political parties by affirming the decision to strike down New York's law requiring parties to use nominating conventions but then vacating the injunction requiring parties to use primaries and remanding for further consideration.

Because the existing statute is unconstitutional not because of its putative impact of the rights of the rank-and-file as opposed to the party leaders, but because it treads on internal party decision-making, the law requiring nominating conventions should be struck down. But because, as a general proposition, the choice of nomination method should be left to the parties themselves, rather than to the State – much less to the courts – the remedy adopted by the district court was inappropriate. Rather than enjoin, through its own authority, the parties from selecting candidates through a convention, the court should have inquired whether, absent he mandatory convention scheme, any provision of state law *required* a primary. While the court below at one point suggested that New York law would require such a result, it said so only as indirect and speculative support of the injunctive authority of the District Court to order that result. The court should instead have inquired into the positi on of the New York authorities regarding whether such a result was in fact mandatory in

the context of judicial elections – a question that at least seems debatable. If such a result is not mandatory under New York law, the method of choosing candidates should be left to the parties themselves, with the State of New York deciding whether such nomination methods are sufficient to garner a place on the general election ballot. If a primary is instead deemed to be the mandatory default requirement in the absence of required conventions, then the parties to this case should be allowed to raise or defend against any further questions and challenges to the constitutionality of that mandatory default procedure, consistent with the First Amendment principles discussed above.

CONCLUSION

For the foregoing reasons, the decision of United States Court of Appeals for the Second Circuit should be affirmed in part on other grounds as to the legality of New York's convention-mandating statute, and vacated in part and remanded as to the appropriate remedy.

Respectfully Submitted,

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